No. 96-1092

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IN THE
**Supreme Court of the United States**

*October Term, 1996*

BRYAN H. CRAWFORD and JIM ATWELL,
d.b.a. Advanced Publications, *et al.*,
*PETITIONERS*

v.

DANIEL E. LUNGREN,
Attorney General of the State of California, *et al.*,
*RESPONDENTS*

**On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit**

**BRIEF *AMICUS CURIAE* OF THE**

**National Law Center for Children and Families,
California Sexual Assault Investigators Association,
Enough Is Enough,
Family Research Council, and
National Coalition for the Protection of Children and Families**

**AS *AMICI CURIAE*, IN OPPOSITION**

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## INTEREST OF THE *AMICI CURIAE*

*Amici* comprise a broad, non-partisan collection of public interest groups whose membership includes law enforcement and other professionals, religious leaders, and lay persons who expend considerable efforts advocating legal and social reforms to protect children. For the Court's convenience, Appendix 4 contains a full description of all *Amici*. The National Law Center for Children and Families acted as counsel for some of the *Amici* when this case was before the United States Court of Appeals for the Ninth Circuit. All *Amici* agree that the decision of the court below was rightly decided and is soundly based on law and precedent. As such, it secures a crucial measure of protection for children from material which this Court has recognized as "harmful to minors."

## CONSENT TO FILE BRIEF

The Parties to this action, Attorney General Daniel E. Lungren, *et al.*, and Bryan Crawford, *et al.*, through their counsel of record respectively, Deputy Attorney General Christopher C. Foley and Stanley Fleishman, have consented to the National Law Center for Children and Families' request to file a brief *amicus curiae*. Original facsimile letters of consent have been provided to the Clerk of the Court.

## THE DECISIONS BELOW

The case number in the United States District Court for the Central District of California is CV94-8343-R.

The decision of the Court of Appeals for the Ninth Circuit is reported at 96 F. 3d 380 (9th Cir. 1996); *reh. denied*, November 29, 1996; *pet. for cert.* filed January 6, 1997, Supreme Court No. 96-1092, docketed January 13, 1997.

## SUMMARY OF ARGUMENT

Petitioners' Writ should be denied because it is based entirely on their objections to evidence and to factual findings and conclusions of law made by the District Court, which the Court of Appeals for the Ninth Circuit affirmed as constitutionally sound. Petitioners cite no conflicting decisions by any other circuit courts of appeal.[1]

The courts below correctly decided this case based upon this Court's long-standing, and often reaffirmed ruling: There is a compelling governmental interest to protect minor children from accessing sexually explicit material defined as "material harmful to minors." When the means to accomplish that compelling interest is the least restrictive and effective means of doing so, even this Court's strict scrutiny standard of review is satisfied.

The Statute in question is the least restrictive, yet effective means to prevent minor children from accessing Petitioners' explicit sexual material that they distribute through unsupervised, coin-operated news racks located on public thoroughfares in California to which minor children have access.

The Statute provides four ways in which Petitioners may continue distributing their pornography in public news racks: 1) By limiting coin-operated news racks to public property from which minors are excluded. 2) By adult supervision of coin-operated news racks located on public property to which minors have access. 3) By providing tokens only to persons 18 years or older for use in news racks on public property to which minors have access. 4) By providing an identification card only to persons 18 years or older for use in news racks on public property to which minors have access. None of the four means interferes with the ability of adults to access the news racks. The Statute restricts no speech whatsoever.

The courts below rightly rejected Petitioners' proposed "less" restrictive means, i.e., a "warning label" affixed to the news racks informing minors that it is unlawful for them to purchase the publications, or a "geographic limitation", prohibiting the news racks near schools or residential areas. The uselessness of these proposals is self-evident. Furthermore, a

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[1] *Amici* are not aware of any conflicting rulings by any of the other circuit courts of appeal.

"warning label" would create an attractive nuisance because children would be drawn to, rather than repelled by, such a "warning." A "geographic limitation" would make it easier for children to access news racks away from the watchful eyes of their parents and teachers.

## REASONS FOR DENYING THE WRIT

### 1. THIS CASE PRESENTS QUESTIONS SUBSTANTIALLY *DIFFERENT* FROM THOSE IN *RENO V. AMERICAN CIVIL LIBERTIES UNION,* NO. 95-511; THE NINTH CIRCUIT'S HOLDING RESTS ON LONG-STANDING PRECEDENT OF THIS COURT.

**a. Petitioners wrongly conclude that this "case presents important and substantial questions similar to those involved in the pending case of *Reno v. American Civil Liberties Union*".[2] Any illusion of "similarity" vanishes when the questions in these cases are compared.**

In *Reno*, the Government is defending the constitutionality of the Communications Decency Act of 1996 (hereinafter "CDA") against facial vagueness and over-breadth challenges to some of its terms. Those include, "knowingly" using an interactive computer service to "send" or "display in a manner available",[3] to a person under the age of 18, "indecent"[4] material. These issues are no more "similar" to this case than are computer communication in cyberspace and coin-operated news racks on sidewalks.

Petitioners herein challenge the right of the People of California to enact Penal Code Section 313.1 (c)(2) and (h)(1)

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[2] Pet. 13.

[3] *Amici* App. 1.

[4] After the district court announced its decision in *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996) (No. 96-511), in which they held that "indecency" is unconstitutionally vague, this Court filed its decision in *Denver Area Ed. Tel. Consortium, Inc. v. FCC*, 116 S. Ct. 2874 (1996), and reaffirmed its prior rulings that the term indecent is **not** unconstitutionally vague.

and (2)[5] (hereinafter "the Statute"), which prohibits Petitioners and other purveyors of sexually explicit material from distributing material harmful to minors in unattended, coin-operated vending machines on public thoroughfares accessible to children. Petitioners have made no facial over-breadth or vagueness challenges to the Statute. They challenge what they allege as a lack of evidence in the legislative record to justify the Statute; that the courts below should not have assumed a compelling state interest as justification; and that the State failed to prove that the Statute is a least restrictive means to achieve that interest.

Petitioners cite the orders of the courts below as proof that "this case presents important and substantial questions."[6] It is certain that none of those orders makes any reference to important and substantial questions *"similar"* to those involved in *Reno.*[7]

The *Reno* court acknowledged that there is a "compelling interest" to protect minors from certain on-line, sexually explicit material.[8] The court enjoined enforcement of the CDA because it found a definition defect,[9] i.e., vagueness and over-breadth, making it unconstitutional on its face. Also, the court did not find compliance possible, "as the evidence made clear, there is no such technology at this time."[10]

*Reno* involves high-tech, interactive computer transmissions in the world of cyberspace communication. The court found that an adult using an interactive computer service cannot know whether he or she is "display[ing] indecency, in a manner available to a person under 18 years" while using a medium that facilitates anonymity. In cyberspace, the participants often try to keep such personal information as age

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[5] *Amici* App. 2.

[6] Pet. 14.

[7] Pet. App. 22, 23, 35, 36, 37-53-55,60-62.

[8] *ACLU v. Reno, 929 F. Supp.* at 853.

[9] *Id.* at 855, n.1:

> It also probably covers speech protected by the First Amendment for some minors a [sic] well, because it fails to limit its reach to that which is harmful for minors, . . . .

[10] *Id.* at 856.

unknown to each other.[11] The court found that "[v]erification of a credit card number over the Internet is not now technically possible":

> There is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms. An e-mail address provides no authoritative information about the addressee, who may use an e-mail "alias" or an anonymous remailer. . . For these reasons, there is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor.[12]

The court also found that adults who participate in newsgroups or in transmitting "indecent" material in an electronic "chat room" cannot know if and when a minor is participating in the "chat room" or has accessed the "newsgroups" or other such fora.[13] The CDA requires proof that indecency is knowingly "display[ed] in a manner available to a minor."[14]

This Statute requires proof that a person has knowingly offered "material harmful to minors" in an unattended coin-operated vending machine "in a public place other than a public place from which minors are excluded". Petitioners stipulated, and the court found to be true, that they distribute sexually explicit material through unattended, coin-operated vending machines on public property.[15] The District Court also found that anyone "with the requisite coins" can access Petitioners' unattended, coin-operated vending machines.[16]

There is no question that the methodology and "technology"[17] exist to enable Petitioners to comply with the Statute. There are two affirmative defenses provided that may substitute for adult supervision of Petitioners' coin-operated

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[11] *Id.* at 845.
[12] *Id.* at 846.
[13] *Id.*
[14] 47 U.S.C. § 223 (d)(1)(B).
[15] Pet. 25, 26, 29.
[16] Pet. App. 32.
[17] *Id.* at 28.

vending machines.[18] "Plaintiffs have not proven that they would be unable to adapt their news racks to comply with the statute."[19] Furthermore, an adult supervisor present at a vending machine needs no cyberspace, state-of-the-art technology to know whether a person who desired to access the vending machine contents is a minor.

Petitioners imply that Section 313.1 (c)(2) is infirm because it "*does not* contain distinct prohibitions against knowingly distributing 'adult' material to minors."[20] [Emphasis in original.] That is unnecessary because that conduct is specifically prohibited by Section 313.1 (a).[21]

Any interference with the First Amendment right of adults to access the Petitioners' material and that of Petitioners' to access the adult market is *de minimus*. The Ninth Circuit made that abundantly clear in its 3-0 decision:

> The State's compelling need to protect children from these publications has been satisfied by the use of a statute which accomplishes the purpose with a precision that protects our First Amendment interests. Neither concern has been sacrificed to the needs of the other. In fine, the statute withstands the attacks made upon it today.[22]

The court reiterated its strong conviction of the correctness of its ruling when it denied review:

> The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.[23]

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[18] *Amici* App. 2.
[19] Pet. App. 31.
[20] Pet. 14.
[21] *Amici* App. 3.
[22] Pet. App. 20.
[23] *Id.* at 54, 55.

**b. The Ninth Circuit's holding rests on the long-standing precedent of this Court.**

The Court of Appeals cited[24] *Ginsberg v. New York*,[25] in which the Court upheld a New York statute prohibiting the sale of material "harmful to minors." This Court held that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .'"[26]

> Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.[27]
>
> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.[28]

In addition to *Ginsberg*, this Court has consistently held that governments have a compelling interest to protect minor children from exposure to and exploitation in pornography. *See New York v. Ferber*;[29] *FCC v. Pacifica*;[30] *Sable Communications, Inc. v. FCC*;[31] and *Denver Area Educational*

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[24] *Id.* at 12.
[25] 390 U.S. 629 (1968).
[26] *Id. at* 638.
[27] *Id* at 636.
[28] *Id.* at 640.
[29] 458 U.S. 747 (1982).
[30] 438 U.S. 726 (1978).
[31] 492 U.S. 115 (1989).

*Telecommunications Consortium, Inc. v. FCC.*[32] There are scores of federal and state pornography cases in which courts have followed this precedent, as well.

## 2. THE COURT'S "STRICT SCRUTINY" STANDARD OF REVIEW WAS APPLIED BY BOTH COURTS BELOW IN UPHOLDING THE STATUTE'S CONSTITUTIONALITY; THERE IS NO CONFLICT WITH THE COURT'S JURISPRUDENCE.

Petitioners wrongly claim that the Statute fails to preserve some "pressing public necessity, some essential value that has to be preserved".[33] The Court called protecting children from exposure to "material harmful to minors", an "exigent interest"[34] and "society's transcendent interest in protecting the welfare of children".[35] Furthermore, the Statute does not restrict any speech.

Petitioners' reliance on *Butler v. Michigan*[36] is not helpful to their assertion that the Statute "substantially burdens the First Amendment rights of adults."[37] *Butler* involved a statute making it an offense to make a book, having a potentially deleterious effect on minors, available even to adults *anywhere* in the general public. *Butler* banned books adults have a right to obtain. The Statute here does not ban or substantially interfere with the ability of adults to access material that is legal for them to obtain.

### a. The Court of Appeals committed no constitutional error by upholding a state's right to enact a statute based on common sense, other statutes and cases, and the right of a reviewing court to do the same.

The Statute abridges no speech.

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[32] 116 S. Ct. 2874 (1996).
[33] Pet. 14.
[34] *Ginsberg* at 636 (1968).
[35] *Id.* at 640.
[36] 352 U.S. 380 (1957).
[37] Pet. 15.

> As our opinion points out, the law does not require, and this record does not provide, any evidence that less restrictive means are unavailable to meet the perceived problem of news rack purchases of adult literature by minors. Thus, our judgment that no less restrictive means is available to achieve that compelling interest, despite the absence of any evidence in the record to support that "finding," is truly instinctive and experiential. We acknowledge as much by our references to our own judgment on this score as "common sense" or "a value judgment" or as compelled because "we cannot imagine" otherwise.[38]

*Paris Adult Theatre I v. Slayton*[39] involved an unsuccessful First Amendment challenge to an obscenity law. The Court based its ruling on the right of legislators to prohibit distribution of obscenity based on the unprovable presumption that the "crass commercial exploitation of sex"[40] is detrimental to society's best interests:

> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. [Citations].[41]
>
> . . . Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense . . . ." [Citations omitted.] Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.[42]

The Ninth Circuit said that "courts can and will rely on common sense, other statutes, and other cases" in applying the

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[38] Pet. App. 21.
[39] 413 U.S. 49 (1973).
[40] *Id.* at 62.
[41] *Id.* at 61.
[42] *Id.* at 62.

strict scrutiny test,[43] and cited *44 Liquormart, Inc. v. Rhode Island* and *Rubin v. Coors Brewing Co.*[44] in support. Although Petitioners acknowledge this,[45] they cite *Rubin* and wrongly fault the Ninth Circuit for failing to recognize that California did not meet its burden under *Rubin* "which is not satisfied by mere speculation and conjecture."[46] Petitioners fail to acknowledge that *44 Liquormart* and *Rubin* involved complete bans on liquor price advertising. Those were express prohibitions, not regulations alleged to be "effective bans."

Petitioners cite *Denver Area,* where "[t]he Court did go on to strike the statutory provision because 'the answers to the question are not obvious'", and "that guesses about the comparative seriousness of the problem are not legally adequate."[47]

The answers to Petitioners' questions are "obvious" and require no "guesses": 1) Material harmful to minors is called such because it is. The State need not produce evidence to prove what has been proved to the satisfaction of the Court and is common knowledge worthy of judicial notice. 2) A reviewing court may find a "compelling state interest" to support a statute, when that interest is obvious from the face of the statute[48] without looking to any legislative record. 3) Preventing minor children from accessing harmful matter and preventing their exposure to harmful material are compelling, "exigent"[49] and "transcending"[50] state interests. 4) Petitioners knowingly distribute material that they, and not the State, label, "Adults only", through unattended, coin-operated vending machines on public thoroughfares in California. 5) Children "with the requisite coins" can access Petitioners' vending machines. 6) Without the Statute, the implication to children, regarding their unrestricted access to vending machine pornography, is "societal

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[43] Pet. App. 13, 14.
[44] 116 S. Ct. 1496 (1996); 115 S. Ct. 1585 (1995).
[45] Pet. 16.
[46] *Id.*
[47] *Id.* at 17.
[48] App. 33 (6).
[49] *Ginsberg* at 636 (1968).
[50] *Id.* at 640.

approval--another potent influence on the developing ego."[51] 7) Without the Statute, minor children can and do access harmful pornography in Petitioners' vending machines and will continue to do so. 8) The Statute will prevent these harms to a very substantial degree. 9) It is obvious from the face of the Statute that there is no less restrictive, yet effective means to accomplish its purpose. 10) Common sense, other statutes and cases adequately answer these questions; the judgment below was not "mere speculation and conjecture".

The California Legislature relied on the Court's holding in *Ginsberg* several years ago when it enacted Penal Code Section 313 *et seq.*, to prevent the offer or the display, exhibition, or distribution of harmful material to minors. Their reason for enacting the new Statute is obviously the same--to aid parents in preventing their minor children from exercising a choice to access harmful material in Petitioners' news racks. Common sense recognizes that parents cannot be with their children at all times, that minors have a right to use public thoroughfares, and that children are attracted by forbidden fruit even when it is harmful. Parents need the assistance of effective laws to aid them in their task of protecting their children from hurting themselves with damaging images and words, from seductive lures such as the cover of Petitioners' material: "AN ADULT NEWSPAPER FOR MEN, WOMEN AND COUPLES 18 AND OVER."[52] A lure made more enticing by a full-page, color photograph of a nearly nude woman posed seductively just a few coins away.

**b. The Ninth Circuit committed no constitutional error by recognizing the State's compelling interest "when the purpose of the Statute is apparent on its face"[53] whether or not the State articulated it.**

- Petitioners have selectively chosen a few statements from the oral argument before the Ninth Circuit to support their contention that the State denied that its compelling state interest

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[51] *Id.* at 642, 643.

[52] "HOLLYWOOD PLAYDATES: VOLUME 9 * ISSUE 197 * FEBRUARY 9, 1994.

[53] Pet. App. 33 (6).

"was the protection of minors from the 'psychological damage' associated with obtaining and reading 'adult' publications, and that the court wrongly "suppl[ied] the compelling state interest"'.[54]

During oral argument, Deputy Attorney General Christopher C. Foley explained that the State's compelling interest includes: "[T]he compelling state interest...What [the] California statute is intended to do is to take the decision away from the child."[55] It is clear that Foley also affirmed the State's compelling interest to prevent minors from being exposed to these materials. Any ambiguity disappears when it is understood that Foley was distinguishing the specific purpose of Section 313.1 (c)(2) from 313.1 (a), which prohibits exhibition or distribution.

> It is not the purchase of the materials by children [that] is the evil that is being addressed. The evil that is being addressed by this statute is the exposure of children to it. The making available to them of these materials which the U.S. Supreme Court almost 30 years ago said that the state does have a compelling interest in preventing minors from being exposed to these materials.[56]

Section 313.1 (c)(2) is intended to "take the decision away from the child", as Foley argued. That is a compelling state interest which prevents a greater damage to a child, as Dr. Gaylin explained and the Court in *Ginsberg* accepted:

> Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the matter he chooses to read: [P]sychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e. disapproved. It is outside of parental standards and not a part of his

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[54] Pet. 18.

[55] Pet. App. 68.

[56] *Id.* at 63.

> identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval--another potent influence on the developing ego.[57] [Emphasis added.]

The Court has long recognized the compelling need for laws to protect vulnerable individuals from exercising a choice that is not in their best interest. The Court articulated that in an obscenity case, *Paris Adult Theatre I v. Slayton,*[58] and upheld it against a First Amendment challenge:

> . . . We do indeed base our society on assumptions that people have the capacity for free choice. Most exercises of individual free choice--those in politics, religion, and expression of ideas--are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. See supra, 61-62, 37 L Ed 2d 459. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.[59] [Emphasis added.]
>
> . . . Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.[60]

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[57] *Ginsberg* at 642, 43 (1968).

[58] 413 U.S. 49 (1973).

[59] *Id.* at 63, 64.

[60] *Id.* at 62.

**c. The Court of Appeals committed no constitutional error by holding that the Statute is the least restrictive and effective means possible, and rightly rejected Petitioners' proposed "warning label" and "geographic limitation".**

It would be unreasonable to force a state to use a non restrictive and totally ineffective means that would not achieve its compelling state interest. One can strain the imagination but not find a less restrictive yet equally effective means to accomplish California's compelling interest. There is none.

Petitioners argue that "the State produced no evidence that it used the least restrictive means of achieving its goals. . . ."[61] The Statute and its affirmative defenses are the evidence. The Ninth Circuit tried to imagine a viable less restrictive means and could not.[62] Petitioners proffered two "less" restrictive means. *See* sections c.1 and c.2. The court said one "borders on the absurd" and the other is "no more efficacious."[63] Petitioners have failed in their burden of proving that their suggested means are at all effective. *See, e.g., Clark v. Community for Creative Non-Violence*.[64] The State has no duty to conjure up other means and then prove they are not effective. It is not the State's fault that the uselessness of Petitioners' proposed solutions is self-evident. As the Ninth Circuit said:

> The harm in question here is obvious, and Crawford points to no other viable method to avoid it. Given Crawford's interest in suggesting other possibilities and the fact that the statute is narrowly tailored to protect children without depriving adults.[65]

In *Dial Information Services v. Thornburgh*,[66] the court relied on *Ginsberg* when it upheld the 1989 amendment, known as a Helms Amendment, that established a "safe harbor" defense for dial-a-porn providers. In addressing the least restrictive means issue, the court of appeals stated:

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[61] Pet. 19.

[62] Pet. App. 19.

[63] *Id.* at 16, 17.

[64] 468 U.S. 288, 293 n.5 (1984); *See also* Pet. App. 13.

[65] Pet. App. 19.

[66] 938 F.2d 1535 (2nd Cir. 1991); *cert. denied* 112 S. Ct. 966 (1992).

> Accordingly, in order for appellees to prevail, it must be determined that there are other approaches less restrictive than the Helms Amendment but just as effective in achieving its goal of denying access by minors to indecent dial-a-porn messages.[67]

**c.1. A "less restrictive" "warning label" would be virtually useless to accomplish the State's compelling interest, and would pose more danger to children.**

In *Berry v. City of Santa Barbara*,[68] the plaintiff there, a Petitioner herein, (Wayne C. Berry), unsuccessfully challenged the constitutionality of the City's "harmful to minors" "blinder rack" display ordinance based on the same claim that a "warning sticker" could be placed on news racks and was less restrictive than a blinder rack. The California Court of Appeals soundly rejected his assertion:

> . . .This, of course, assumes that the warning will work, i.e., that the minor will heed the warning. We cannot indulge this assumption. . . . Appellant has not demonstrated as a matter of law that a warning sticker would further the articulated interest of keeping harmful material away from minors.[69]
>
> . . . The fact that sales of the publication may decline when blinder racks are in place does not mean that the ordinance unreasonably restricts adult access to these materials. The First Amendment is not a sword to enhance marketing tactics. Nor is it a shield for peddlers of erotica to expose their wares to minors.[70]

A warning sticker/label is an example of "straining the imagination". It would create an attractive nuisance rather than provide any protection for minor children on the public sidewalks of California. The Ninth Circuit totally rejected the idea:

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[67] *Id* at 1541.

[68] 40 Cal. App. 4th 1075; 47 Cal. Rptr. 2d 661 (1995).

[69] *Id* at 1085, 86.

[70] *Id* at 1086.

> It borders on the absurd to say that a youngster would be deterred by an announcement which said something like '[This publication] is highly explicit and is intended for adults over the age of 21 only.' As a California Court of Appeal has said in a similar context, 'This, of course, assumes . . . that the minor will heed the warning. We cannot indulge this assumption.' Berry, 40 Cal.App.4th at 1085, 47 Cal.Rptr.2d at 667.[71]

Petitioners have not provided any evidence from any hearings, studies, or findings to support the efficacy of their bald assertion. They do not even argue that it would be effective--just less restrictive. Even if a "warning label" might possibly deter some children, it would certainly not be as effective as the means in the Statute, and that it must be.

**c.2. A less restrictive "geographic limitation", away from the public eye, would make it easier for minor children to access Petitioners' sexually explicit material.**

The Ninth Circuit relied on *Sebago, Inc. v. City of Alameda*,[72] in holding that geographic restrictions are not efficacious and that "[n]o doubt the legislature relied upon that wise analysis." The court said: "We do too". . .[73]

> Any determined teenager can seek out the relocated news racks. As Sebago points out, it is just as likely, if not more likely, that a minor will purchase an adult newspaper from a news rack far away from the watchful eyes of parents and neighbors.[74]

Petitioners cite *Sable* and *Denver Area*, which the Ninth Circuit distinguished, in comparing the ease with which minors can access Petitioners' news racks:

> This is not a method of purveyance where only 'a few of the most enterprising and disobedient young people' can break through

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[71] Pet. App. 16, 17.

[72] 211 Cal. App. 3d 1385, 259 Cal. Rptr. 918 (1st Dist. 1989).

[73] Pet. App. 17, 18.

[74] *Sebago v. City of Alameda* at 1387 (1989).

> some sophisticated electronic system designed to exclude them. . . . Any youth with a few coins can access the materials in question.[75]

Petitioners cite several liquor and tobacco advertising cases to argue that the Ninth Circuit's "instinct" about the feebleness of geographic limitations is wrong. These cases involve laws that prohibit advertising, such as billboards, in locations where children generally walk and play" and limit billboards to commercial or industrial zones.[76] The distinction between those cases and this case is monumental.

Tobacco and liquor are harmful; therefore, it is wise to keep liquor and tobacco advertising away from children. It follows, *a fortiori*, that no rational society would allow anyone to place those harmful products in unsupervised, coin-operated vending machines anywhere on public thoroughfares. These cases indirectly support the California Legislature's compelling interest to enact the Statute. If those who care for the well-being of children do not want them exposed to the influence of advertisements for harmful products, how in the name of reason and common sense can a society allow another product "harmful" to minors to be distributed through unsupervised, coin-operated vending machines on public thoroughfares.

### 3. THE STATUTE DOES NOT LIMIT THE CONTENT OF ADULT COMMUNICATIONS TO THAT WHICH IS SUITABLE FOR CHILDREN.

Petitioners are factually incorrect telling the Court that:

> The District Court found that section 313.1 (c) (2) standing alone constitutes a total ban, (App. 26-27), and that the defense provided for in section 313.1 (h) (1) is no defense at all, (App. 27).[77]

The District Court used words such as, "likely" to "make it more difficult" and "'not commercially feasible", when addressing these defenses.[78] The court held, as a matter of law,

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[75] Pet. App. 18.

[76] Pet. 20, 21.

[77] *Id.* at 24, 25.

[78] Pet. App. 26, 27.

that the interest burdened by the Statute "does not rise above a commercial interest in profits and an inconvenience on the part of consumers, neither of which is sufficient to outweigh the harm to society". . . .[79]

The Statute does not ban sales of protected speech in news racks nor substantially burden "adult-to-adult"[80] communication. Petitioners' pornography may still be distributed through news racks in one of four ways permitted by the Statute. "Plaintiffs have not proven that they would be unable to adapt their news racks to comply with the statute."[81] The Statute will only interfere with Petitioners' adult-to-child pornographic communication, but that will achieve the State's compelling interest.

Petitioners' reliance on *Bolger v. Youngs Drug*,[82] and *City of Cincinnati v. Discovery Network, Inc.*,[83] is not helpful. They are both easily distinguishable from this case.

*Bolger* concerned a postal statute that expressly banned unsolicited mailing of contraceptive advertisements which the Court said was appropriate, helpful information for children as well as adults.[84] The Court acknowledged the ability of parents to refuse the mailings and to dispose of them if they wished. Parents in California have no such recourse because they may never know their child has accessed material from news racks. The Court also found that the mailings did not present the same "uniquely pervasive" intrusion into the home as broadcasting that is "uniquely accessible to children, even those too young too read".[85] Petitioners' news rack pornography is "uniquely accessible to children," and is inherently harmful to them. Even those "too young to read" will absorb the explicit sexual pictures. It is as easy for children outside of the home to drop coins into news racks as it is to turn on a radio or television in the home.

In *Discovery*, the City unilaterally revoked Discovery's news rack permits solely because they distributed commercial

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[79] *Id.* at 33.
[80] Pet. 21.
[81] Pet. App. 31.
[82] 463 U.S. 60 (1983).
[83] 507 U.S. 410 (1993).
[84] 463 U.S. at 75, n.30.
[85] *Id.* at 73, n.28.

handbills. The Statute herein will not revoke Petitioners' permits. They may continue to distribute their material through news racks if they comply with the Statute.

## 4. THE COURTS BELOW COMMITTED NO CONSTITUTIONAL ERROR BY RECOGNIZING THAT ADULTS MAY *ALSO* OBTAIN PETITIONERS' MATERIAL IN ALTERNATIVE WAYS.

Petitioners are factually incorrect in stating that:

> "The district court, (App. 33), and the court of appeals, (App. 18), stated that it was permissible to ban newsrack sales because reasonable alternative means of communication, other than News racks on public streets, exist for Petitioners to distribute their publications. . . . [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged by the plea that it may be expressed in some other place.[86]

Neither court stated any such principle. The Ninth Circuit stated (Pet. App. 18):

> The statute provides two defenses which allow for the retention of the news racks; and, although those defenses may impose some economic burden, they do enable the publishers to continue distributing their publications on streets. *Also*, the publications can be made available through other distributors if the price and salability of the publications make them profitable. See Denver Area, ___ U.S. at ___, 116 S. Ct. at 2387 (Breyer, J. writing for plurality). If, as Crawford suggests, merchants do not wish to carry these materials, that is no fault or business of the State. [Emphasis added.]

The District Court said that Petitioners' only burdens are a "commercial interest in profits" and "an inconvenience on the part of consumers. . . ." (Pet. App. 33). The court held that neither outweighed the "harm to society" caused by Petitioners'

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[86] Pet. 27.

"unattended news racks, even if the statute causes harmful matter to be distributed from news racks no longer."

Petitioners' increased costs and decreased profits are not adequate grounds to support their First Amendment challenge to the Statute, even if, as Petitioners "allege", it resulted in an effective ban.[87]

In *Sable Communications of California, Inc. v. F.C.C.*,[88] the Court applied its holding in *FCC v. Pacifica Foundation*,[89] and held that "credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors." The Court made clear that additional costs incurred by the providers of patently offensive sexual expression, in order to comply with the law, did not affect the constitutionality of the statute:

> . . . While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.[90]

The Statute does not deny Petitioners' access to the "adult" newspaper market. Any additional cost of compliance with the Statute they will incur, if any, is the result of their insistence on an alleged right to take "adult" material out of an "adult" bookstore or an "adult" section of a retail business (from which minors are excluded), and put it in unattended, coin-operated news racks on public thoroughfares with total disregard for the "harmful aspects" to the children of California. Such egregious conduct and greed, which has circumvented the spirit and intent of Section 313.1 (a), should not be elevated to protected speech under the First Amendment.

Finally, Petitioners' reliance on the court's holding in *Schneider v. State*[91] is inapposite to this case: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged by the plea that it may be expressed in some other

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[87] Pet. 7, 8.
[88] 492 U.S. 115 (1989).
[89] 438 U.S. 726 (1978).
[90] 492 U.S. at 126.
[91] 308 U.S. 147 (1939).

place."[92] In *Schneider*, handbillers were prohibited on public streets but allowed in public parks and alleys. They were not accused of leaving "material harmful to minors" unattended and accessible to minors on public streets where it is not "appropriate." That is what Petitioners are doing.

The Statute and its defenses will allow Petitioners' material to remain in news racks along public streets, and the children of California will be protected from accessing "material harmful to minors," as well they should.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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Respectfully submitted,

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[92] *Id.* at 163.

App. 1

47 U.S.C. Section 223 (d) provides:

> Whoever --
>
> (1) in interstate or foreign communications knowingly --
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> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
>
> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication, or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> shall be fined or imprisoned up to 2 years or both.

# App. 2

California Penal Code Section 313.1 (c) (2) states:

> Any person who knowingly displays, sells, or offers to sell in any coin-operated vending machine that is not supervised by an adult and that is located in a public place, other than a public place from which minors are excluded, any harmful matter, as defined in subdivision (a) of section 313, shall be punished as specified in Section 313.4.

California Penal Code Section 313.1 (h) (1) and (2) states:

> (h) It shall be a defense in any prosecution for a violation of paragraph (2) of subdivision (c) that the defendant has taken either of the following measures to restrict access to the harmful matter by persons under 18 years of age:
>
> (1) Required the person receiving the harmful matter to use an authorized access or identification card to the vending machine after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the card of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen, or used by persons under the age of 18 years or that the card is no longer desired.
>
> (2) Required the person receiving the harmful matter to use a token in order to utilize the vending machine after taking reasonable measures to ascertain that the person was 18 years of age or older.

App. 3

California Penal Code Section 313.1 (a) states:

> Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly sells, rents, distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter to the minor shall be punished as specified in Section 313.4.

App. 4

The **National Law Center for Children and Families** ("NLC") is a law enforcement support organization which provides training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors and police agencies throughout the United States and in several foreign countries. The NLC focuses on legal issues and law enforcement related to obscenity, child pornography and other forms of child sexual exploitation and abuse, the broadcasting of indecent material, and the display and dissemination of materials which are harmful to minors. The NLC has participated in numerous *amicus curiae* briefs before the United States Supreme Court, federal courts of appeals, state supreme courts, and state appellate courts on these issues.

The **California Sexual Assault Investigators Association** was founded in 1979. The membership includes over eight hundred specialists in the fields of law enforcement, forensic nursing, advocacy, parole, probation, treatment, social work, prosecution, and the judiciary. Their mission is to promote a constructive relationship among sexual assault investigators and members of related disciplines through training, networking, improved services to victims, and to support legislation.

The **Enough is Enough** campaign, launched in November of 1992, embraces a vision to restore an environment in which citizens are free to raise their children and conduct their lives without the intrusion of illegal sexual material. Their mission is: To educate the public about the existence, availability, and dangers of illegal pornography, thereby enlisting public support to make pornographic material unavailable to children; to make illegal pornography unavailable in the marketplace; and to encourage community efforts to guard against illegal pornography and treat its victims.

The **Family Research Council** ("FRC") is a national educational and public policy organization concerned with family protection and decency issues. FRC works in the public policy arena to preserve and protect the family, consequently giving it significant knowledge concerning the harmful effects of obscene material on the family and violent criminals. Its president is Mr. Gary Bauer and its Director of Legal Studies is Cathleen Anne Cleaver, Esq.

The **National Coalition for the Protection of Children & Families** (formerly known as "N-CAP" or the National Coalition Against Pornography) is a national public education and citizen advocate organization which works to increase public awareness of the harm caused to the American family by obscene, indecent, and other pornographic and harmful materials. The Coalition is active at local and national levels, both in this country and in countries around the world, in its attempt to minimize the threat obscene materials pose to society. Its president is Dr. Jerry Kirk. The Coalition is also an affiliate of the Religious Alliance Against Pornography ("RAAP"), which is an international organization of church and religious leaders to educate people about the destructive influence of pornography and its offense to the Almighty.